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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5696-N-08]

Clarifying Guidance, Waivers, and Alternative Requirements for Grantees in Receipt of Community Development Block Grant Disaster Recovery Funds under the Disaster Relief Appropriations Act, 2013

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice provides clarifying guidance, waivers, and alternative requirements for Community Development Block Grant (CDBG) disaster recovery grantees in receipt of funds under the Disaster Relief Appropriations Act, 2013 (Pub. L. 113-2). To date, the Department has allocated \$10.6 billion under the Act to assist recovery in the most impacted and distressed areas identified in major disaster declarations due to Hurricane Sandy and other eligible events in calendar years 2011, 2012 and 2013.

DATES: **[Insert date 5 days from date of publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Stan Gimont, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street, SW, Room 7286, Washington, DC 20410, telephone number 202-708-3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Facsimile inquiries may be sent to Mr. Gimont at 202-401-2044. (Except for the "800" number, these telephone numbers are not toll-free.) E-mail inquiries may be sent to disaster_recovery@hud.gov.

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I. Background

The Disaster Relief Appropriations Act, 2013 (Pub. L. 113–2, approved January 29, 2013) (Appropriations Act) made available \$16 billion in Community Development Block Grant (CDBG) funds for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas resulting from a major disaster declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 et seq.) (Stafford Act), due to Hurricane Sandy and other eligible events in calendar years 2011, 2012, and 2013. As the Appropriations Act requires funds to be awarded directly to a State, or unit of general local government (hereinafter, local government) at the discretion of the Secretary, the term “grantee” refers to any jurisdiction that has received a direct award from HUD under the Appropriations Act.

On March 1, 2013, the President issued a sequestration order pursuant to section 251A of the Balanced Budget and Emergency Deficit Control Act, as amended (2 U.S.C. 901a), and reduced funding for CDBG disaster recovery (CDBG-DR) grants under the Appropriations Act to \$15.18 billion. To date, a total of \$10.6 billion has been allocated for the areas most impacted by Hurricane Sandy and other disasters occurring in 2011, 2012, and 2013. To describe these allocations and the accompanying requirements, the Department published multiple notices (collectively, the “Prior Notices”) in the **Federal Register**. The requirements of the Prior Notices continue to apply, except as modified by this Notice.

Links to the Prior Notices, the text of the Appropriations Act, and additional guidance prepared by the Department for CDBG–DR grants, are available on HUD’s Web site under the Office of Community Planning and Development, Disaster Recovery Assistance:

http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/drsi. The same information is also available on HUD’s OneCPD Web site: <https://www.onecpd.info/cdbg-dr/>.

II. Applicable Rules, Statutes, Waivers, and Alternative Requirements

The Appropriations Act authorizes the Secretary to waive, or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Waivers and alternative requirements are based upon a determination by the Secretary that good cause exists and that the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 et seq.) (HCD Act). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5.

This Notice clarifies or modifies guidance provided by the Prior Notices. For each waiver and alternative requirement described in this Notice, the Secretary has determined that good cause exists and the action is not inconsistent with the overall purpose of the HCD Act. Grantees may request additional waivers and alternative requirements from the Department as needed to address specific needs related to their recovery activities. Under the requirements of the Appropriations Act, waivers must be published in the **Federal Register** no later than five days before the effective date of such waiver.

1. Action Plan for Disaster Recovery waiver and alternative requirement—Infrastructure Programs and Projects (only applicable to Hurricane Sandy grantees).

a. *Definition of "Benefits Multiple Counties"*. The Notice published November 18, 2013, describes additional requirements that apply to major infrastructure projects (see paragraph 2g, under section VI, Applicable Rules, Statutes, Waivers, and Alternative Requirements, at 78 FR 69107). Specifically, the Notice states: "HUD approval is required for each major infrastructure project with such projects defined as having a total cost of \$50 million or more (including at least \$10 million of CDBG–DR funds), or benefits multiple counties." For purposes of the identifying major infrastructure projects under the November 18, 2013 Notice, HUD defines "benefits multiple counties" to mean that a major infrastructure project is physically located in more than one county.

b. *Obligated Public Assistance Grant Program Projects*. Oftentimes, CDBG-DR grantees are awarded recovery funds under FEMA's Public Assistance (PA) Grant Program. Through the PA Program, FEMA provides grant assistance to states, tribal and local governments, and certain types of private nonprofit organizations for: debris removal; emergency protective measures; and the repair, replacement, or restoration of disaster-damaged, publicly-owned facilities, and the facilities of certain private, nonprofit organizations. The PA Program also encourages protection of these damaged facilities from future events by providing assistance for hazard mitigation measures during the recovery process. The PA Program requires grantees to contribute a non-federal share to a project—typically, 25 percent of the total project cost. For example, if the repair of a public facility costs \$1 million, FEMA provides \$750,000 while the grantee provides \$250,000. However, in the states of New York and New Jersey, due to the amount of damage caused by the storm, FEMA has reduced the non-federal share for Hurricane Sandy PA projects

to 10 percent of the project's total cost (FEMA will provide the remaining 90 percent). This reduction is allowed under FEMA regulations.

Per the HCD Act (42 U.S.C. 5305(a)(9)), CDBG funds (including CDBG-DR funds) may be used for the payment of the non-federal share required in connection with a federal grant-in-aid program (e.g., the FEMA PA Program) that provides funding for a CDBG-eligible activity. Prior to HUD's Notice allocating a second round of funding for grantees in response to Hurricane Sandy (78 FR 69104, published November 18, 2013), many of these grantees had coordinated with FEMA to secure PA funding for critical infrastructure projects. Thus, the infrastructure requirements described in paragraph 2 at 78 FR 69107 will not apply to Hurricane Sandy grantees with PA projects where funds have been obligated by FEMA on or before November 25, 2013. The infrastructure requirements described in paragraph 2 at 78 FR 69107 apply in full to PA projects where funds have been obligated by FEMA after November 25, 2013.

c. Comprehensive Planning Process Required by Another Federal Agency. Paragraph 2d, under section VI, Applicable Rules, Statutes, Waivers, and Alternative Requirements (at 78 FR 69107) of the Notice published November 18, 2013, is amended as necessary to allow the following: where a grantee provides a local match (using CDBG-DR funds) for an infrastructure project that is covered by a comprehensive planning process required by another Federal agency (e.g., FEMA, the Department of Transportation, U.S. Army Corps of Engineers, Environmental Protection Agency, etc.), HUD does not require the grantee to repeat the analysis completed during that planning process as part of its comprehensive risk analysis. Rather, that process may be referenced and/or adopted to assist the grantee in meeting its responsibility to conduct the comprehensive risk analysis required by the November 18, 2013 Notice.

2. Documentation of low- and moderate-income national objective for multi-unit housing projects (New York City only). Per the HCD Act and the Prior Notices, Hurricane Sandy CDBG-DR grantees may fund the rehabilitation, reconstruction, and new construction of housing. To further address its housing needs, New York City has requested to measure the benefit to low- and moderate-income households, in multi-unit residential projects, in a manner more supportive of mixed income housing. In general, the applicable regulation, 24 CFR 570.208(a)(3), requires at least 51 percent of the units in an assisted multi-unit structure to be occupied by residents that are income eligible. This method of calculating the benefit to low- and moderate-income households is often referred to as the structure basis.

HUD has reviewed other housing assistance programs that measure benefit differently—only those units in a multi-unit structure occupied by income eligible residents are used to calculate the benefit to low- and moderate-income households. Under this “unit” approach, when units are alike, the proportion of CDBG funds contributed to the project may be no more than the proportion of units in the project that will be occupied by income-eligible households. For this reason, this approach is sometimes called the proportional units approach. In other words, the rule under the structure approach is that a dollar of CDBG assistance to a structure means that 51 percent of the units must meet income requirements. Under the unit approach, the amount of assistance provided is equal to the cost of units occupied by low- and moderate-income households.

Based on HUD experience, the unit approach can be more compatible with large-scale development of mixed-income housing. For example, in response to the widespread devastation caused by Hurricanes Katrina and Rita, HUD allowed the states of Louisiana and Mississippi to use this approach under their respective CDBG-DR programs. Additionally— (1) the CDBG

program rule has a built-in exception that allows limited use of the unit basis for multi-unit non-elderly new construction structures with between 20 and 50 percent low- and moderate income occupancy, (2) in the HOME Investment Partnerships program, HUD's primary housing production program, HUD grantees use funds to pay for the cost of affordable units, and (3) the Neighborhood Stabilization Program permitted grantees to use a unit basis approach to meet the CDBG low- and moderate-income benefit requirement.

After review of the city's Action Plan for Disaster Recovery, and discussions with the city regarding its intent to encourage mixed-income housing development, HUD has determined that it is consistent with the overall purposes of the HCD Act to provide the city the requested additional flexibility in measuring program benefit. Therefore, the waiver and alternative requirements allow the city to measure benefit within a housing development project: (1) according to the existing CDBG requirements, or (2) according to the unit approach described above for multi-unit housing projects involving rehabilitation and/or reconstruction. However, the second option may only be used if the units are generally comparable in size and finishes. The city must select and use one method for each project. For these purposes, the term "project" will have the same meaning as in the HOME program at 24 CFR 92.2. The city is reminded that per 2 CFR part 225, CDBG-DR costs must be necessary and reasonable. To meet this requirement, the city must develop policies and procedures to document its costs for housing investments are necessary and reasonable. The city must also meet all civil rights and fair housing requirements.

3. Limited purpose modification of overall benefit requirement (city of Minot only). The primary objective of the HCD Act is the "development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic

opportunities, principally for persons of low and moderate income.’’ 42 U.S.C. 5301(c). To carry out this objective, the statute requires that 70 percent of the aggregate of the grantee's CDBG program's funds be used to support activities benefitting low- and moderate-income persons.

This target can be difficult, if not impossible, for many CDBG-DR grantees to reach as a disaster impacts entire communities—regardless of income. Further, it may prevent grantees from providing assistance to the most damaged areas of need. Therefore, as described by the Prior Notices, the city of Minot, in addition to the other grantees under the Appropriations Act, received a waiver and alternative requirement—only 50 percent of funds must be used for activities that benefit low- and moderate-income persons. Additional flexibility was provided in the March 5, 2013 Notice (78 FR 14329). It allowed a grantee to request to further reduce its overall benefit requirement if it submitted a justification that, at a minimum: (a) identifies the planned activities that meet the needs of its low- and moderate-income population; (b) describes proposed activity(ies) and/or program(s) that will be affected by the alternative requirement, including their proposed location(s) and role(s) in the grantee's long-term disaster recovery plan; (c) describes how the activities/ programs identified in (b) prevent the grantee from meeting the 50 percent requirement; and (d) demonstrates that the needs of non-low and moderate-income persons or areas are disproportionately greater, and that the jurisdiction lacks other resources to serve them. Upon HUD's review of the justification, the request can be granted only if the Secretary found a compelling need to reduce the overall benefit below 50 percent.

In response to the above, the city of Minot submitted a justification addressing the required criteria. As described in that letter, the city has received two awards of CDBG-DR funds (appropriated by two separate laws) in response to the severe flooding of the city in the summer of 2011. Early in the recovery process, the city identified housing as the largest unmet

need for the low- and moderate-income population. Funding from the first allocation was used to fund housing rehabilitation and reconstruction only for low- and moderate-income households. In addition, the city obligated \$2.2 million for infrastructure and acquisition activities to support two affordable rental housing projects (one will create 42 units of workforce housing, the other will result in 40 units of senior housing), and \$5.1 million for infrastructure to support home development, as well as to provide pads for mobile homes for low- and moderate-income families. Further, the city is exploring the development of a homeless shelter, and projects to provide 60 affordable rental units for Minot's low- and moderate-income residents through a small rental rehabilitation and reconstruction program. In sum, the city's first appropriation of CDBG-DR funds, under Section 239 of the Department of Housing and Urban Development Appropriations Act, 2012 (Pub. L. 112-55, approved November 18, 2011), was \$67,575,964; over 52 percent of that allocation is anticipated to benefit low- and moderate-income persons.

As the city moves forward with funding received under a second appropriation law, the Appropriations Act, the focus of the recovery has narrowed to the long-term needs of the city's Flood Inundation Area. This area is four square miles and includes the downtown area and the oldest and most heavily developed portion of the city. It was inundated with two to fifteen feet of water during the 2011 flood and sustained the most severe damage. According to the city, two types of long-term activities, both located within in the Flood Inundation Area, are most urgent: acquisition/buyout of properties and street repair and improvements. In regards to acquisition/buyouts, the city has allocated \$14.8 million. These funds will act as a 25 percent match to funding provided by the North Dakota State Water Commission, for a total project cost of over \$51 million. Additionally, \$9.7 million has been allocated for street repair and improvements. The balance of the city's second allocation, \$10.6 million, will be used for

reimbursement of home repairs, street repairs in an area located outside the Flood Inundation Area, and planning and administrative costs.

HUD has reviewed the flood inundation data and maps, and the census tract information provided by the city. Of the 14 block groups that comprise the Flood Inundation Area, only four have low- and moderate-income populations of at least 51 percent. An average of the 14 groups demonstrates that the total low- and moderate income population of the Flood Inundation Area is approximately 45.2 percent. According to the HUD FY14 data, the median family income in Ward County, where Minot is located, is \$65,700. To be considered a low- and moderate-income household, a family with four persons has an income equal to, or less than, \$53,200.

Thus, to enable the city to undertake the activities it has deemed most critical for its recovery, and to ensure that low- and moderate-income households are adequately served and/or assisted, HUD is granting a limited waiver and alternative requirement to reduce the overall benefit from 50 percent to not less than 23 percent. Based on the city's justification, the Secretary has found a compelling need for this reduction due to the unique circumstances related to Minot's request. In particular, HUD notes that the City has already prioritized the needs of low- and moderate-income populations with its first allocation; the low- and moderate-income population in the Flood Inundation Area is close enough to 50 percent that it nearly qualifies under the overall benefit waiver in the March 5, 2013 Notice; given that the Flood Inundation Area is likely to flood again, the City has identified getting people out of harm's way as a top priority and this waiver will allow low- and moderate-income families to take advantage of Minot's program for this purpose; and finally, the waiver will enable the City to leverage non-Federal funds for its buyout program. This is a limited waiver modifying 42 U.S.C. 5301(c), 42 U.S.C. 5304(b)(3)(A), 24 CFR 570.484, and 570.200(a)(3) only to the extent necessary to permit

the City to use funds appropriated by Pub. L. 113-2 for flood buyout and street repair programs in the 14 block groups of the Flood Inundation Area with a low- and moderate-income population of approximately 45.2 percent, as described in its Action Plan.

4. Tenant-based rental assistance (applicable to the State of New York and the city of Joplin). The State of New York and the city of Joplin have requested a waiver of 42 U.S.C. 5305(a) in order to provide tenant-based rental assistance to households impacted by disasters eligible under the Appropriations Act. After reviewing each grantee's request, HUD is waiving 42 U.S.C. 5305(a), to the extent necessary, to make eligible rental assistance and utility payments paid for up to 2 years on behalf of homeless and at-risk households when such assistance or payments are part of a homeless prevention or rapid rehousing program or activity. Eligible assistance may also include rental (i.e., security) deposits and utility deposits when the grantee determines that such payments are necessary to help prevent a family from being homeless. While existing CDBG regulations may allow payments for these purposes, grantees under the annual CDBG programs are subject to a much shorter time limitation (3 months).

The goal of this waiver is to minimize the time households are homeless by providing rehousing and rental assistance, and by linking the individual or family with services that can help them become stable and self-sufficient. Both grantees' use of CDBG-DR funds for this purpose could measurably advance the Department's priority on supporting forward-thinking solutions to help communities that are struggling to house and serve persons and families that are homeless or at risk of homelessness. In addition, HUD has previously granted the State of Louisiana a similar waiver for its recovery in response to Hurricanes Katrina and Rita. Further justification for granting the waiver to both grantees, and the specifics of how the waiver will apply to each grantee, are detailed below. Either grantee using these funds in combination with an existing

Section 8 Housing Choice Voucher (HCV) program must coordinate with HUD's Office of Public and Indian Housing; however, as this waiver is limited to two years from the effective date of this Notice, grantees are strongly encouraged to ensure households assisted in whole or in part with CDBG-DR funds are transitioned to an alternate source of assistance, if necessary.

Unless noted otherwise, the term "Section 8" refers to the Section 8 HCV program.

a. *State of New York.* The State of New York anticipates up to \$10 million of CDBG-DR funds will be used to support an emergency rehousing program designed to assist households that are homeless, or in imminent danger of becoming homeless, as result of Hurricane Sandy, Hurricane Irene or Tropical Storm Lee. The State anticipates the funds will be used in conjunction with the State's Social Service Block Grant, which will support an intensive case management system to help locate housing and stabilize the household through a range of services.

Prior to seeking a waiver, the State explored all options available to those most in need of housing assistance. To date, FEMA has approved over \$1 billion of assistance to more than 115,000 households located in the State of New York. The State has launched significant housing programs to address rehabilitation and reconstruction, however, these programs are not specifically targeted to address the urgent needs of the homeless—many of whom are still housed in shelters or other non-permanent accommodations as a result of Sandy, Irene and Lee. For example, it is estimated that Long Island's current homeless population in shelters exceeds 2,000; approximately 1,000 of these individuals were forced to the shelter as a result of Sandy. Meanwhile, the Section 8 rental assistance program is experiencing a tremendous demand and has a limited supply of available housing, while HOME resources have been reduced by sequestration. The State is aware of individuals being served by the FEMA Temporary Rental

Assistance Program, the Transitional Sheltering Assistance, and the Disaster Housing Assistance Program; however, many of these programs have reached funding limits, or are not eligible sources of assistance for the majority of the homeless.

Thus, for the State of New York, the Department is waiving 42 U.S.C. 5305(a), to the extent necessary, to make eligible tenant-based rental assistance for the homeless population, or those at risk of becoming homeless, due to the effects of Hurricane Sandy, Hurricane Irene, or Tropical Storm Lee. Households will not be eligible for tenant-based rental assistance if they have rejected public housing assistance or declined a Section 8 voucher.

b. *City of Joplin*. As a result of the May 2011 tornado, Joplin's housing stock, including its Section 8 voucher program, was severely impacted. In regards to the Section 8 program, 85 voucher-holders were displaced. Since the tornado, new housing units have gradually been added to Joplin's inventory; however, many of these are more costly as Joplin's rental market evolves. Compounding the issue, during its recovery, the Joplin housing authority experienced a decrease in its "fundable" voucher population due to a lack of available units. As a result of this decrease, the voucher budget provided to the city also decreased, despite the needs of additional households that were displaced. Thus, the city seeks the use of CDBG-DR funds to assist Joplin's housing authority restore its program to reach pre-disaster voucher levels. After reviewing the city's request, the Department is waiving 42 U.S.C. 5305(a), to the extent necessary, to make eligible tenant-based rental assistance so that the city may restore its Section 8 program to pre-disaster levels. Households will not be eligible for tenant-based rental assistance if they have rejected public housing assistance, or declined a Section 8 voucher. A maximum of \$290,000 may be provided by the city for this use.

Going forward, the city and the housing authority are strongly encouraged to continue to assess the voucher program to ensure households in need will have adequate resources available at the expiration of this waiver.

III. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the disaster recovery grants under this Notice is as follows: 14.269.

IV. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th

Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

Date: March 24, 2014

Mark Johnston
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